No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HALLIBURTON OIL WELL CEMENTING COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 24–29) is reported at 57 F. Supp. 408. The majority and dissenting opinions of the Circuit Court of Appeals (R. 480–483) are reported at 152 F. 2d 622.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 29, 1945 (R. 484). The petition for a writ of certiorari was filed on March 29, 1946, and granted on May 13, 1946.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent's employment contract guaranteed the payment of a fixed weekly amount to be paid for all workweeks in which the hours worked did not exceed 84. The contract also specified an hourly rate and provided for the payment of compensation at not less than one and one-half times this rate for all hours in excess of 40 per week. The hourly rate was computed, however, so that an employee would have to work in excess of 84 hours a week in order to earn more than the guaranty. The question presented is whether the hourly rate of pay specified in the agreement or the weekly guaranty determines the "regular rate" of pay upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act of 1938.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * *

> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Respondent performs various services for persons engaged in the drilling and operation of oil wells (R. 63). This suit relates to a group of respondent's employees, consisting of cementers, testers, cement equipment drivers, field mechanics and others, who are known as "field employees" (R. 31). Shortly after the enactment of the Fair Labor Standards Act, respondent adopted the employment plan involved in this suit which, except for the period from March 1, 1942, until July 1, 1942,[1] has continued in effect until the present time (R. 13, 68–70, 71–73). The contract under

[1] From March 1, 1942, until July 1, 1942, respondent's field employees were paid a weekly salary and overtime compensation on the basis of a regular rate computed by dividing hours worked into the weekly salary (R. 17). Respondent's answer states that for this period the plan set forth in Section 12 of the Administrator's Interpretative Bulletin No. 4 was adopted (R. 17). Section 12 (R. 235) reads as follows: "If an employee earns $23 per week but works a fluctuating number of hours, his regular rate of pay will be the average hourly rate each week. Suppose that during the course of

this plan provided for a weekly guaranty and specified an hourly rate for the first 40 hours of work each week and not less than one and one-half times this rate for hours worked in excess of 40 (R. 13–14, 68–70, 71–73).[2] The guaranty was approximately 106 times the specified hourly rate (R. 73–74). As explained by respondent, "the basic hourly rate has been fixed so that each employee * * * may work a total of 84 hours in any single workweek before receiving compensation in excess of the guaranteed weekly salary" (R. 314–315).

Prior to the effective date of the Act the field employees were paid on a monthly salary basis

four weeks the employee works 40, 46, 50, and 41 hours. His regular hourly rate of pay each week is approximately 57.5 cents, 50 cents, 46 cents, and 56.1 cents, respectively. For the first week the employee is entitled to be paid $23; for the second week, $24.50 ($23+[6 hours×25 cents]) or ([40 hours ×50 cents]+[6 hours×75 cents]); for the third week $25.30 (23+[10 hours×23 cents]) or ([40 hours×46 cents]+[10 hours×69 cents]); for the fourth week approximately $23.28 ($23+[1 hour×28 cents]) or ([40 hours×56.1 cents]+[1 hour×84 cents])."

[2] The contract provision involved here is as follows:

"Now, Therefore, the Employer and Employee mutually covenant and agree as follows:

"Employer agrees to employ Employee as a _____ and to pay Employee for his services a regular basic rate of _____ cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40) hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $_____ for each workweek." (R. 63, 71–72.)

and received their compensation semimonthly (R. 13, 64). Notwithstanding the provisions in the present contract for a basic hourly rate and a weekly guaranty, the field employees continued to receive monthly salaries, paid semimonthly in substantially the same manner as before (R. 64, 78).[3] Respondent stated that "field employees are now working and will continue to work on a monthly minimum salary basis; however, for contract purposes, the monthly salary is reduced to an equivalent weekly salary" (R. 77–78). A payroll chart was devised from which "the basic hourly rate and the guaranteed weekly salary may be determined" for the particular "monthly salary desired" (R. 64, 65, 73–74, 316). Compensation under the plan was referred to by respondent as "paid on a monthly salary basis, rather than on an hourly basis" (R. 276), and it was stated that the guaranteed wage would be paid "even when the necessities of the business do not require the employee to work more than a few hours in a given week" (R. 312). Thus the hourly rate specified in the contract was never used (R. 114, 143–144, 160–178), and respondent

[3] Although respondent's employment contract remained virtually the same for the entire period during which the plan involved here was in use, several changes in the record-keeping and payment practices under the plan did occur. For example, on January 30, 1944, after the institution of this litigation, respondent began to pay its employees on a bi-weekly instead of semimonthly basis (R. 115, 180, 181–182). Other changes will be referred to as they become relevant.

admitted that the overtime rate listed in the payroll chart "has no practical use unless the employee works in excess of 84 hours in a single workweek" (R. 316). Employees were paid the same salary whenever they worked less than 84 hours a week, whether 20, 40, 60, 80 or any other number of hours (R. 160–177).

Respondent's payroll records apparently disregarded the hourly and overtime rates specified in its contracts and payroll chart in workweeks of less than 84 hours. A sample payroll sheet, forwarded by respondent to its superintendents in connection with instructions for paying employees, omitted entirely any reference to the specified hourly and overtime rates and contained only the monthly salary together with the semimonthly payment (R. 64, 65, 105, 106).[4] A later sample payroll sheet sent out with additional instructions also included the monthly salary but not the hourly and overtime rates (R. 65, 107, 114). Although this payroll sheet provided

[4] The procedure to be followed was described in the instructions as follows:

"In the column headed 'Rate', show the monthly salary which is equivalent to the guaranteed weekly salary in the employee's contract and in the column 'Extensions', show the earnings for the semimonthly period based on the monthly rate. No further posting by the field office is necessary as the Duncan office will compute and add to the guaranteed earnings any compensation for hours in excess of 84. This procedure eliminates the use of columns 'OT Pay' and 'Total Overtime' by the field pay roll offices for contract employees." (R. 82–83.)

columns for "regular time worked," "overtime worked" and "overtime pay," the superintendents were instructed to consider "84 hours or less" as regular time and "hours in excess of 84 in a week" as overtime (R. 111, 114). Overtime pay was to be calculated only for hours in excess of 84 "from the chart previously forwarded" (R. 111–112).[5] It was not until January 1944, after the institution of this litigation, that the hourly and overtime rates appearing in the contracts and payroll chart, as well as the guarantee, were reflected on the payroll sheet and that the hours worked in excess of 40 were recorded as overtime hours (R. 65, 115, 120).

Wage increases and deductions for absences were considered in terms of the monthly salaries paid the employees rather than the hourly rates

[5] The instructions issued were as follows:

"The total hours worked during each week must be filled in the proper column, then the regular time worked (84 hours or less) will be filled in the next column and overtime hours (Hours in excess of 84 in a week) will be entered in the overtime hours worked column. * * *

"Calculate overtime pay from the chart previously forwarded to all Division offices of which one copy is enclosed. Column '4', Overtime Hourly Rate, is the rate for one hour of overtime to be multiplied by the number of overtime hours in the week to determine the overtime pay entered on the pay roll for each week.

"Enter the monthly rate in the next column, extending the proportionate part of the monthly rate (in most cases one-half of the monthly rate) to the bottom line of the column 'Extensions'. On the line above enter the total Overtime Pay, which is the sum of all overtime pay listed in the Overtime Pay column." (R. 111–112.)

specified in the contracts. When an increase was effected, the employee was informed that the new contract reflected "his change in salary from his previous monthly rate to the new rate' (R. 108, 121). When an employee was absent from work for such reasons as sickness or "voluntary lay off," his pay was reduced in accordance with "the same policy that has always been in effect" (R. 318), not on the basis of his hourly or overtime rate, but on the basis of a daily wage computed as a proportionate amount of the contract guaranty. This was the regular and frequent practice whether payment under the contract was made semimonthly or, as later, biweekly (R. 106, 110, 114, 120, 138, 150, 217–222). At first the "half month's equivalent [of the monthly salary] was divided by the number of days in that particular payroll, either 15 or 16" to compute the daily deduction rate (R. 138). Later, when respondent's field employees were placed on a biweekly pay basis, instructions provided that "one-seventh of the weekly guarantee may be considered a daily guarantee for the number of working days in the week" (R. 116).

The 84-hour workweek established by the respondent as its employees' standard workweek did not represent the regular or usual, or even the average, number of hours worked by the field employees. A tabulation of the man-weeks of work performed from July 5, 1942, to March 11,

1944, shows that approximately 80 percent were weeks in which less than 84 hours were worked (R. 226, 384) and that approximately 13 percent were weeks in which less than 40 hours were worked (R. 384). According to respondent's estimates, the average weekly hours of work were considerably less than 84 for all classes of workers. The average workweek of operators was 61.6 hours, drivers 62.4 hours and mechanics 56.5 hours (R. 357–362). On the basis of the average number of hours worked, the average hourly rate received by each class of employees was considerably higher than the specified overtime rate.

The overtime rate employed was a fixed rather than a fluctuating rate. Although the contracts of employment provided that overtime was to be paid at "not less than one and one-half times" the designated hourly rate (R. 70, 71), the payroll chart contained a specific overtime rate to be used in computing compensation (R. 73, 103, 111–112). This fixed rate was entered on the payroll sheets after January 1944 (R. 116, 120). As a result, when less than 84 hours were worked in a given week, the hourly and overtime rates did not equal the guarantee. Since the additional compensation was not considered overtime, it was recorded as "Additional Compensation Per Weekly Guarantee" without allocation to either regular time or overtime (R. 116, 120).

The District Court, relying on this Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, held

that respondent did not violate the overtime requirements of the Act in computing overtime compensation on the basis of the hourly rates specified in the contracts (R. 28, 29, 34) and entered a judgment dismissing the complaint (R. 43–45). The Circuit Court of Appeals affirmed on the ground that the case presented neither a "substantial distinction" from the *Belo* case nor "any difference in principle" (R. 481). Judge Garrecht dissented stating that in his view the contracts "were for weekly wages, for variable hours * * *. The arbitrary hourly rates written into the contracts are fictitious and unrelated to the facts and the evidence. * * * [The] arbitrarily chosen 84-hour week bore no relation to the regular or usual number of hours worked by the employees under consideration. * * * In my opinion the 'hourly rates' fixed in the contracts in this case were fictitious and calculated merely to retain the employer's prestatutory costs" (R. 482–483).

SPECIFICATION OF ERRORS

The court below erred:

1. In holding that the hourly rates specified in the contracts between the respondent and its field employees were the "regular rates" at which the employees were employed within the meaning of Section 7 of the Fair Labor Standards Act.

2. In affirming the judgment of the District Court which denied petitioner's prayer for an injunction.

SUMMARY OF ARGUMENT

The hourly rate specified in respondent's wage contract is not the statutory "regular rate" because it is not in fact the measure of the compensation normally received by respondent's employees. It is clear from the operation of respondent's compensation plan that the contract guaranty actually controls the wages paid in the normal workweek. The only manner in which the specified hourly rate can be squared with the guaranty is by assuming a fluctuating overtime rate which would encompass all compensation in excess of that paid for nonovertime work. But this assumption is contradicted by respondent's use of a fixed overtime rate. Also, it would not account for the payment of the guaranty in weeks when no overtime was worked. The artificiality of the contract rates is obvious because of their failure to compel the payment of additional compensation for hours worked in excess of the statutory maximum. Moreover, recognition of the specified hourly rate as the regular rate would frustrate the statutory policy of making more expensive to the employer hours in excess of the statutory maximum and of requiring premium pay to employees for overtime hours.

The decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, should not control here. There are factual distinctions which permit a different result. For example, in the present case additional compensation could not be earned until

84 hours had been worked, in *Belo* this period was limited to 54½ hours. Unlike the employer in the *Belo* case, respondent used a fixed overtime rate which made it necessary to provide additional compensation to equal the guaranty. If the differences are not sufficient to distinguish the cases, the *Belo* decision should not be followed because it is inconsistent with the later decisions of the Court.

ARGUMENT

I

THE HOURLY RATE SPECIFIED IN RESPONDENTS' EMPLOYMENT CONTRACTS IS NOT THE "REGULAR RATE" WITHIN THE MEANING OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT

A. Specification of an hourly rate in an employment contract does not determine the "regular rate" under Section 7

The decisions of this Court have clearly established that the hourly rates specified in contracts of employment are not necessarily the regular rates at which the employees are employed within the meaning of Section 7 of the Fair Labor Standards Act. Specified regular or hourly rates were disregarded in determining the statutory regular rate in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, where the contract also contained a piece rate guaranty, in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, where the employee was guaranteed a "job price," known as an "incentive bonus" or "piece-work earnings," and in *Walling* v. *Helmerich & Payne*, 323 U. S. 37, where the specified regular rate was allocated

to only part of a daily tour of duty and an overtime rate to the balance. In each of these cases the Court emphasized that the regular rate was the rate actually paid for the time regularly spent in working, notwithstanding the contract designation of a different rate. And, where guaranteed rates yielded more than the prescribed hourly rates, it was stated that the latter "lose their significance in determining the actual rate" and that the former "would actually be the rates paid." *Harnischfeger* case, *supra*, at 432; *Youngerman-Reynolds* case, *supra*, at 432. Therefore, in the instant case, whether the contract hourly rates are the regular rates depends, not upon the terms of the contract, but upon whether the compensation received by the employees is actually determined by the specified rates or by the guaranty provided in the contract.

B. The hourly rates specified in the contracts did not in fact control the compensation received by respondent's employees

A realistic appraisal of respondent's compensation plan compels the conclusion that in intendment and in practice the contract guaranty controlled the wages paid respondent's employees and that the specified hourly rates did not genuinely reflect the actual rates at which the employees were employed. As we have seen, prior to the effective date of the Act, respondent's employees were paid a monthly salary (R. 13). The wage plan put into effect after enactment of the statute

and reintroduced in July 1942 continued, in practical effect, the monthly salaries previously paid without the payment of additional compensation for hours in excess of the statutory maximum. Although the wage contracts provided for hourly rates and overtime compensation at not less than one and one-half times the stated rate, these rates were admittedly devised so that employees might work 84 hours a week without receiving compensation in excess of the guaranteed amount (R. 80, 314–315). However, less than 84 hours were worked in approximately 80 percent of the weeks worked (R. 226, 384). Thus, in a substantial majority of cases the compensation to be paid was, and could be, ascertained only by application of the guaranty provided in the contract. Payment at the specified hourly and overtime rates for weeks in which fewer than 84 hours were worked would have yielded a sum less than that actually paid. Since the guaranty actually controlled the compensation paid, it must be considered, under the decisions of this Court, as determinative of the regular rate. *Youngerman-Reynolds* case, *supra; Harnischfeger* case, *supra.*

The controlling importance of the contract guaranty in fixing compensation was recognized in respondent's own payroll practices. When the guaranty plan was reinstituted in July 1942, the sample payroll sheet which accompanied the respondent's instructions did not even contain

the hourly rates but carried only the guaranteed monthly salaries and the amount of the semi-monthly payment (R. 105, 106). A modified sample payroll sheet sent out shortly thereafter also contained the monthly salary but not the hourly rates (R. 114). This payroll sheet and the accompanying instructions furnished further evidence of the meaningless character of the specified hourly rates. Notwithstanding the contract provision that the "regular basic rate" was to be paid for the first 40 hours of a workweek and the overtime rate for all additional hours (R. 71), respondent's division superintendents were instructed to record 84 hours or less as regular time worked and hours in excess of 84 as overtime (R. 111). These instructions realistically evaluated the effect of the employment contract for, as stated by respondent, the "overtime rate * * * has no practical use unless the employee works in excess of 84 hours in a single workweek" (R. 316). And the designated regular rate has no greater practical use.

Other aspects of respondent's compensation practices demonstrate that the guaranty, rather than the specified hourly rate, was the governing factor in the employment contract. Deductions made for absences were not calculated at overtime rates in an overtime week or at regular rates in a non-overtime week, as they would have been if the hourly rates were in fact employed as the

measure of compensation. Instead, the guaranty was resorted to again to fix the amount of the reduction. When employees were paid on a semimonthly basis their pay was reduced by a pro rata portion of the semimonthly salary (R. 110, 138), and when payment was changed to a biweekly basis by a pro rata portion of the weekly guaranty (R. 116, 150).

Thus the method of operation under respondent's employment contract clearly establishes the guaranty as the principal effective element in determining the wages actually paid and, therefore, as the measure of the statutory regular rate. It cannot be urged here that the guaranty does not control because a flexible overtime rate of not less than one and one-half times the basic rate may account for the difference, in workweeks of less than 84 hours, between the compensation at the specified regular rate and the compensation actually paid in accordance with the guaranty. Cf. *Walling* v. *Belo Corp.*, 316 U. S. 624, 632. There are at least three obvious answers to this argument. (1) The fixed overtime rate employed by respondent specifically negates the use of a flexible overtime rate (R. 73, 103, 111–112). (2) Even if a fixed overtime rate were not employed the only means of ascertaining the amount of overtime compensation payable in workweeks of less than 84 hours would be by reference to the guaranty and not to a hypothetical and undeter-

mined overtime rate. (3) The payment of the guaranty in workweeks of less than 40 hours when no overtime was worked precludes the allocation of the additional compensation to overtime hours (R. 160–177). Since in actual practice the guaranty determines the compensation paid for the first 84 hours worked, it must be concluded that the guaranty necessarily furnishes the basis for determining the regular rate of pay under the Act. *Walling* v. *Youngerman-Reynolds, supra; Walling* v. *Harnischfeger Corp., supra.*

Even if we assume a situation contrary to the facts of this case, in which fluctuating overtime rates did account for all compensation paid, the very artificiality of such rates would suffice to demonstrate their invalidity. Cf. *Walling* v. *Helmerich & Payne, supra.* The manner in which a fluctuating overtime rate would operate illustrates its fictional character. Under the terms of respondent's guarantee, if an employee worked only 41 hours he would be paid overtime at the approximate rate of 6,600 percent of his specified regular hourly rate; he would be paid at the approximate rate of 3,300 percent for two hours overtime, 2,200 percent for three hours of overtime, and at a decreasing overtime rate for additional hours of work (R. 73). This anomaly—a decreasing ratio between the regular rate and the overtime rate as the overtime hours increase—disregards not only the historical function which

an overtime rate is intended to fulfill but also the general practice in American industry today.[6]

A plan which depends upon a fluctuating overtime rate for its validity is no less artificial than so-called "x-plans" which incorporate a formula for reducing a weekly salary to a regular rate.[7] Under the x-plans, application of the rates arrived at by use of the formula will produce the predetermined salary which was in fact paid. Such plans have been consistently rejected by the courts.[8] Both the fluctuating overtime and the x-plans by "ingenious mathematical manipulations" (see *Helmerich & Payne* case, 323 U. S. 41), apply varying rates to achieve a constant weekly wage for a workweek in excess of the statutory maximum. In the former a variable overtime rate and a constant "regular" rate are

[6] See, for example, United States Bureau of Labor Statistics, Bulletin No. 686, *Union Agreement Provisions*, 1942, p. 91, particularly paragraphs A and B; and United States Bureau of Labor Statistics, Bulletin No. 823, *Union Agreements in the Petroleum Refining Industry in Effect in 1944*, p. 7.

[7] Under the x-plan the "regular" rate for employees employed more than forty hours per week is determined by dividing their weekly earnings by the total number of hours employed plus one-half of the number of hours employed in excess of 40 hours.

[8] *Walling* v. *Helmerich & Payne*, 138 F. 2d 705 (C. C. A. 10); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C. C. A. 3); *Castle* v. *Walling*, 153 F. 2d 923 (C. C. A. 5); *Asselta* v. *149 Madison Ave. Corp.*, June 17, 1946 (C. C. A. 2), 6 Wage Hr. Cases 99; *Patsy Oil & Gas Co.* v. *Roberts*, 132 F. 2d 826 (C. C. A. 10); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10).

manipulated to equal the weekly salary while in the x-plan the formula utilizes a constant overtime rate and a variable "regular" rate. In both instances the so-called regular rates are derived in essentially the same manner. Under the fluctuating overtime plan the "regular" rate is computed by dividing the weekly salary by 40 plus one and one-half times the number of hours a predetermined maximum workweek exceeds 40. Under the x-plan the "regular" rate is computed by dividing the weekly wage by 40 plus one and one-half times the number of hours actually worked in excess of 40.

The inherent deficiency of the x-plan was recently described by the Circuit Court of Appeals for the Second Circuit as follows: "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty-hour workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek." *Asselta* v. *149 Madison Ave. Corp., supra.* Similarly, a fluctuating overtime plan provides only an illusion of overtime compensation for hours worked in excess of 40.

C. Respondent's artificial wage plan frustrates the statutory purposes

We have shown that the specified regular and overtime rates were artificial and of no effect and that the contract guaranty was intended to and in fact did control the compensation received by respondent's employees for the first 84 hours of a workweek. As we have seen, for these reasons alone, the guaranty is the measure of the statutory regular rate. But in any event, since statutory purposes would be defeated by respondent's scheme, the stated regular rate can not be regarded as the regular rate under the statute. Cf. *Helmerich & Payne* case, *supra*.

In each of the three decisions of this Court previously cited (*Walling* v. *Helmerich & Payne, supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra; Walling* v. *Harnischfeger, supra*) the Court stressed the purposes of the overtime requirements of the Act in invalidating the wage plans there involved. As pointed out in the *Helmerich & Payne* case, "The Congressional purpose of enacting § 7 (a) was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement * * *; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act" (323 U. S. at 40; see also *Walling* v. *Youngerman-Reynolds*, 325 U. S. at 423–424). The section was thus designed to increase "the employer's labor costs by 50% *at the end of the 40-hour week*" and to give

"the employees a 50% premium for all excess hours" (*Youngerman-Reynolds* case, *supra*, at 423, italics supplied; see also *Walling* v. *Harnischfeger Corp.*, 325 U. S. at 431). The designated hourly rates failed to effectuate the statutory policy in these cases. As a result they were disregarded in determining the regular rate under the Act.

Similarly the guaranteed wage plan here does not satisfy either of these purposes. It enables respondent "to avoid paying real overtime wages for at least the first 40 hours [44 hours in the instant case] worked in excess of the statutory maximum workweek, thus negativing any possible effect such a payment might have had upon the spreading of employment." *Helmerich & Payne* case, 323 U. S. at 40. Since the employee receives the same wages whether he works 30, 50, 70 or 84 hours a week, the respondent incurs no additional financial cost until the employee's workweek exceeds 84 hours. Accordingly, there is no incentive to the employer "to reduce the hours of work [to the statutory maximum] and to employ more men." *Walling* v. *Youngerman-Reynolds*, 325 U. S. at 424. And the statutory purpose "of compensating the employees for the burden of a long workweek" (*ibid.*) is equally frustrated, inasmuch as respondent's plan is "so designed as to deprive the employees of their statutory right to receive for all hours worked in excess of the first regular 40 hours one and one-

half times the actual regular rate." *Walling* v. *Helmerich & Payne*, 323 U. S. at 40. This frustration of the statutory purpose is not made any the less real by the payment of additional compensation to employees who sometimes work more than 84 hours, more than twice the statutory maximum. The contract cannot convert the statutory workweek of 40 hours into an 84-hour workweek.

It is clear that Congress did not contemplate that a plan like respondent's would carry out the policy of spreading employment by imposing an economic limitation on hours of work. The means devised to effectuate this limitation was the familiar and historical method of exerting pressure on the employer to reduce hours by providing for the payment of additional wages at premium rates for work performed in excess of a predetermined standard workweek. The workweek determined by the Congress to be standard was one which was "in conformity with current practice as regards the bulk of American business" at the time the Act became effective.[9] (The Cotton Textile Institute, *Current Information*, Vol. 4, No. 7, November 10, 1938, p. 71.). And the premium rate of time and one-half for overtime

[9] The standard workweek had declined from 60 hours in 1896 to 48.4 hours in 1926 (Douglas, Paul H., *Real Wages in the United States 1890–1926*, 1930, p. 150) and to 40.4 hours by February 1937 (Millis, Harry A., and Montgomery, Royal E., *Labor's Progress and Some Basic Labor Problems*, 1938, pp. 481 and 485).

had been generally incorporated in union agreements covering industries and trades in which the workers were organized; thousands of others had become familiar with the principle of time and one-half for overtime work as a result of the awards of the National War Labor Board[10] (World War I) and the industrial codes established under the National Industrial Recovery Act.[11]

The historical function of premium rates for overtime work in effectuating organized labor's efforts to reduce the workday and workweek is clear. See Barnett, George E., "The Printers", *American Economic Association Quarterly*, October 1909, Vol. X, No. 3, p. 157. As early as 1863 a union contract provided the equivalent of time and one-half for overtime beyond 60 hours a week;[12] and in the decades immediately following it was not uncommon for trade unions to obtain premium overtime rates for a shorter workweek or workday.[13] When the Fair Labor Standards

[10] Reeder, Robert P., *Analysis of the Awards of the National War Labor Board* (1919), pp. 22 and 48; United States Department of Labor, *Monthly Labor Review*, March 1918, p. 71, April 1918, p. 183, and May 1918, pp. 127–128, 133, 137, 142.

[11] N. R. A. Division of Reviews, Work Materials No. 35, Part B, *Labor Provisions in the Codes* (1936), pp. 84–93, 105.

[12] United States Bureau of Labor Statistics, *History of Wages in the United States from Colonial Times to 1928* (Bulletin No. 499, October 1928), pp. 491–498, 514–516.

[13] See, for example, Fifth Annual Report of the Bureau of Statistics of Labor of the State of New York (1887), pp. 187, 275, 301.

Act was enacted, organized labor had achieved a maximum workweek of 40 hours or less in many extractive, manufacturing, and service industries. For example, collective bargaining agreements called for a 30-hour week for longshoremen on the Pacific Coast, a 35-hour week in the coal mining industry, a 36-hour week in the men's clothing industry, a 37½-hour week in the newspaper publishing industry and a 40-hour week for those employed in the iron and steel, stone, rubber, petroleum refining, metal mining, food and agricultural processing, and many other industries. United States Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review* (February 1938), Vol. 46, No. 2, pp. 341–343. It must be assumed, we submit, in the light of the continuous drive for shorter working hours and the role played by premium overtime rates in achieving them, that these collective agreements established a genuine limitation on the number of hours an employee could work each week. Thus, in enacting a law designed to spread employment, Congress utilized a technique developed by trade unionists who had realistically recognized many years before that "overtime shortens the seasons of employment" and that "when there are men unemployed, to employ more men fewer hours is better" Samuel Gompers, *Report of the United States Industrial Commission*, Vol. VII, p. 614 (1901).

Respondent's plan pays lip service to the statutory purposes by establishing a fictional 40-hour

workweek which stands in striking contrast to the genuine 40-hour week prevalent in industry at the time of the Act's passage. It actually subverts the intent of Congress, however, by substituting an 84-hour week thereby encouraging work in excess of the statutory maximum. Not only is the statutory incentive towards the reduction of working hours removed when an employee receives the same wages whether he works 35 or 84 hours but there is incentive to increase the length of the workweek so as to reduce the hourly labor cost. In such circumstances, an employer is not likely to employ additional workers to achieve a desired level of production within a 40-hour workweek, but "because there is no increase of labor cost between the statutory maximum and the hours contracted for * * *, the employer has a financial inducement to require hours beyond the statutory maximum." *Walling* v. *Belo Corp.*, 316 U. S. 624, dissenting opinion, at 639. The result of validating such a plan is the complete nullification of the overtime provisions of the Act for incalculable numbers of workers whom Congress itself has not seen fit to exempt specifically.

The frustration of the Act's overtime policy by respondent's plan can hardly be justified on the theory that it achieves the security of a regular and uniform weekly income. Cf. *Walling* v. *Belo Corp., supra.* Unlike annual wage and annual employment plans, respondent's plan does not assure continuity of employment but merely guar-

antees a minimum weekly wage for those weeks during which the worker is employed. Only plans which assure regular employment and income on an annual basis recognize "the significance of the fact that workers consume the year around, and, properly to arrange their financing and budgeting should earn income by the year." Chernick, Jack, and Hellickson, George C., *Guaranteed Annual Wages*, 1945, p. 8.[14] In recognition of this economic fact and in order to permit the continuance and extension of guaranteed wage and employment plans within the framework of the overtime requirements of the Act, Congress in Section 7 (b) (2) of the Act set forth the conditions under which employers and employees could contract to regularize employment on an annual

[14] See also Feldman, Herman, *Stabilizing Jobs & Wages*, 1940, p. 167. For example, the annual employment plan developed by the Proctor & Gamble Company has been in operation since 1923. Under this plan the employee is guaranteed at least 48 weeks of employment, at the prevailing wage, in each calendar year. In a slack period the weekly hours of work may be reduced, but not below 30 hours or 75 percent of the regular 40-hour workweek. See Chernick, Jack, and Hellickson, George C., *Guaranteed Annual Wages*, 1945, pp. 29–30.

The "flexible wage plan" adopted by the Nunn-Bush Shoe Company in 1935 guarantees 52 pay checks a year to "eligible employees." The amount of weekly pay varies with the wholesale value of the company's product, all wage payments other than overtime being made from a fund established by setting aside a fixed percentage of the wholesale value of shoes sold. The regular workweek is 40 hours. No worker under the plan was dismissed from 1935 to 1945. Bureau of Labor Statistics, *Guaranteed Employment & Annual Wage Provisions in Union Agreements*, 1945, pp. 6–7.

basis. This provision clearly indicates that Congress was well aware of "the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week" and from season to season. See *Walling* v. *Belo Corp.*, 316 U. S. at 635. It also shows the manner and extent to which Congress intended to accommodate the overtime provisions of the Act to the security of a regular income.

Section 7 (b) (2), as amended (29 U. S. C., Supp. V, 207 (b) (2)),[15] permits the requirements of Section 7 (a) to be relaxed, in return for employment upon an annual basis, pursuant to an agreement which embodies the annual maximum of working hours, "made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board." The section also imposes an annual maximum of 2,080 hours (an

[15] Section 7 (b) (2) provides: "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed * * * (2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks * * * and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed."

average of 40 hours a week) compared with the contracts in this case, under which an employee may work 4,368 hours a year (84 x 52) without additional compensation. Clearly, respondent's contracts do not conform to this pattern established by Congress to meet the problems in businesses where the work hours fluctuate.[16]

Moreover, any advantage of a minimum guaranty for fluctuating hours in weeks of actual employment is also assured by payment of a guaranteed weekly salary and additional one-half time for hours in excess of the statutory maximum under the principles of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.[17] Recognition of the guaranty as the

[16] See also Sections 7 (b) (1), 7 (b) (3), 7 (c). Moreover, fluctuations have sometimes been reduced under the economic pressure exerted by the payment of genuine overtime compensation. In industries characterized by a high degree of seasonal fluctuation, like the construction and apparel industries, the 40-hour week has been established for some time. Indeed, the 40-hour workweek was introduced as a means of reducing seasonal fluctuations and of spreading employment among a larger number of men and over more weeks in the year. Haber, Williams, *Industrial Relations in the Building Industry* (1930), pp. 117–119; *Report & Proceedings of the 19th Convention of the International Ladies Garment Workers* (1928), p. 11. In this connection, a study made of the wages paid employees engaged in petroleum production and the drilling of oil and gas wells in Oklahoma, Texas, and Louisiana may be significant. Approximately "99 percent of the establishments in the survey paid time and a half for hours in excess of 40 per week, and over 20 percent also paid this premium rate for hours in excess of 8 in any 1 day" United States Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review*, February 1945, p. 351.

[17] See Feldman, Edward S., *Algebra and the Supreme Court*, 40 Ill. Law Rev., 512–513 (1946).

genuine measure of compensation would achieve this result. As the dissenting judge in the court below said (R. 483): "In order to determine the true regular hourly rate in these cases, we have only to divide the weekly wage (or guaranty as the contracts term it) by the number of hours worked in each week, thus arriving at the regular hourly rate for each workweek. The hourly rate may vary for each workweek—in relation to the number of hours worked. That is not inconsistent with the provisions and purposes of the Act." Determining the regular rate in this manner (1) squares with the actualities of employment, (2) preserves the assurance of minimum weekly compensation, and (3) avoids violence to the statutory purpose.

II

THE DECISION OF THIS COURT IN THE *BELO* CASE SHOULD NOT CONTROL HERE

In holding that respondent's compensation practices under its contract of employment did not violate the overtime requirements of the Act, the court below relied upon the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624. It is our view (1) that there are sufficient differences to distinguish this case from the *Belo* case, particularly in the light of the limited scope of the *Belo* decision under the more recent decisions of this Court in the *Helmerich & Payne*, *Youngerman-Reynolds*, and *Harnischfeger* cases, and (2) that, if the doctrine of the *Belo* decision

has not been narrowed sufficiently to remove the instant case from its scope, it is inconsistent with both the aforementioned decisions of this Court and the purposes of the Act, and should be overruled.

The *Belo* plan was upheld because the majority of this Court in that case "felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed." See *Youngerman-Reynolds* case, 325 U. S. at 426. Having found that the hourly rate was in fact genuine and controlling, this Court said that the weekly guarantee was not "inherently inconsistent" with the specified hourly rate but might reasonably be construed as consisting of the specified hourly rate for nonovertime hours and a fluctuating rate for overtime hours. *Belo* case, 316 U. S. at 631. But the *Belo* case does not hold that the recital in a contract of an hourly rate necessarily establishes a genuine hourly rate and it is clear from this Court's subsequent decisions that the contract would not have been upheld if the artificiality of the specified hourly rates had been adequately established.

Important factual differences highlight the artificiality of the hourly rates here. Respondent's employees could earn no additional compensation unless they worked more than 84 hours in a week, whereas the *Belo* contract permitted additional payments after 54½ hours. The tabulation of the man-weeks of work performed by respondent's employees from July 5, 1942, to

March 11, 1944, discloses that the vast majority of the employees worked considerably less than 84 hours a week most of the time (R. 384); respondent's own estimates show that the average workweek approximated 60 hours (R. 384). Whatever reason there may have been for holding that the 54½-hour week in the *Belo* case was consistent with the actual facts of employment, clearly here the "84-hour week bore no relation to the regular or usual number of hours worked by the employees under consideration" (dissenting opinion of Judge Garrecht, R. 483). Thus, unlike the guarantee in the *Belo* case, the guarantee here did not even approximate the amount earned by the application of the artificially specified rates in the substantial majority of the workweeks. Moreover, the theory employed by the Court in the *Belo* case to square the specified hourly rate with the weekly guaranty cannot be applied here. In the *Belo* case it was thought that all compensation above that for regular hours at the specified hourly rate might be considered overtime compensation by the use of a fluctuating overtime rate. In the instant case, as already noted, respondent's employees received their weekly salaries in the substantial number of weeks in which they worked less than 40 hours. In these workweeks the amount paid in excess of that due on the basis of the specified hourly rate cannot be explained as overtime compensation, for there were no overtime hours. See *Belo* decision, 316 U. S. at

632.[18] Even in workweeks of more than 40 hours, respondent did not consider the portion of the guaranty in excess of 40 times the specified rate as being paid for overtime work. As we have seen, a specific overtime rate was provided and the payroll records contained an entry for "Additional Compensation Per Guarantee" where compensation for the hours worked at the hourly and overtime rates applied did not equal the guaranty (R. 120; pltf. ex. 3A, R. 181–182).

In view of these differences between the operation of the *Belo* and respondent's contracts, the cases can be distinguished. If the two cases are not considered distinguishable, however, we submit that the *Belo* decision should not be followed because its application would be at variance with the reasoning of the subsequent decisions of this Court in which wage plans which failed to give effect to the statutory purposes of the overtime requirements of the Act were struck down.

We have shown that under respondent's wage plan (1) the contract guaranty in fact determines the compensation paid its employees for the first 84 hours of work, (2) the specified hourly rate is artificial in character and is not employed to ascertain the compensation payable to respond

[18] Examination of the *Belo* record discloses that the $40 weekly guaranty was paid whether more or less than the statutory maximum hours were worked. (*Belo* record 194–337.) However, the significance of these facts was not fully appreciated prior to this Court's decision, and, therefore, they were not emphasized when that case was under consideration.

ent's employees, and (3) to give effect to the specified hourly rate would thwart the dual statutory purposes of (a) spreading employment by increasing an employer's labor cost for hours in excess of 40 and (b) giving employees premium pay for work in excess of the statutory maximum. This plan cannot be sustained under the decisions of this Court in the *Helmerich & Payne, Youngerman-Reynolds* and *Harnischfeger* cases. In these decisions specified hourly rates were held not to establish the statutory regular rate because actually inoperative, artificial or contrary to the statutory design. Application of the *Belo* decision in this case would require a rejection of the sounder principles of the later decisions."

[19] The potentialities of avoiding the overtime provisions of the Act by a broad application of the *Belo* doctrine is illustrated by the attitude of some businessmen to the decision. One employer advised that the *Belo* plan "makes it unnecessary to compute overtime work from week to week," that "no additional payments are necessary unless the employee works more than the number of hours determined by his contract," and that "employers following the *Belo* method avoid the payment of compensation in excess of a guaranteed weekly wage". Hubbell, W. C., *How to Simplify Computing Overtime Wages*, Rand McNally Bankers Monthly, June 1943, p. 260. Mr. Hubbell described the technical aspects of the plan as follows: "The employer and employee enter into a written contract fixing the employee's hourly rate of pay (not less than the legal minimum). The employer agrees to pay, in addition, a 'bonus' equal to the difference between the compensation determined at the hourly rate (with time and one-half for overtime hours) and a guaranteed weekly wage which the employee is to receive in any event. The hourly rate is fixed at an amount which with overtime, would rarely, if ever, exceed the guaranteed wage" (*ibid.*).

The effect of these decisions on the scope of *Belo* is made clear by the view taken by three Circuit Courts of Appeals that if this Court "has not repudiated its holding in the *Belo* case, it has come so close as to leave no room for its application except upon an identical state of facts." *Walling* v. *Uhlmann Grain Co.*, 151 F. 2d 381, 383 (C. C. A. 7); *Walling* v. *Alaska-Pacific Consolidated Mining Co.*, 152 F. 2d 812, 814 (C. C. A. 9); *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. C. A. 2). It may be appropriate at this time to define the area of *Belo's* continued vitality, if any, so that employers will know that plans designed to avoid the Act's overtime requirements will not be upheld.

CONCLUSION

For the foregoing reasons the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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